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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 233.

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, Petitioner.

REPLY BRIEF OF PETITIONER.

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In the Brief for Respondent the statement is made that the supporting brief of the Petitioner treats this case as if it were a proceeding between a stockholder and the receiver of a national bank. Petitioner is not aware of any such treatment. It has, however, insisted that the rights of Respondent were fixed and determined by the conduct of the parties and the proceedings in the courts during the term of the receivership.

The fund of which Respondent speaks as having been made up of contributions was the result of payments made by all the shareholders who paid assessments and not just the Respondent. Since all of them

contributed they were all entitled to participate in all of the contributions. When a shareholder pays his assessment that assessment becomes a part of one general fund for the payment of debts. After all the debts of the trust are paid each shareholder is entitled to participate in the balance of the fund in proportion to the amount which it contributed. *In re First National Bank of Arthur, Illinois,* 100 F. 2d 623 (1938.)

Under the law of the Commonwealth of Pennsylvania, payment of debts may be made by the delivery of property. *Hamilton v. Moore* 4 W. & S. 570 (Pa.); *Richabaugh v. Dugan,* 7 Barr 394 (Pa.); *Heath v. Page,* 48 Pa. 130 at 143, and where the parties, at the time of the delivery of the assets, fix a value to the property transferred, the delivery of that property, in law, is equivalent to the payment of that much money. Volume 1, *Cyclopedia Law and Procedure,* 335; *Griffith v. Creighton,* 81 Mo. App. 1; Volume 1 *American and English Encyclopedia of Law,* Second Edition 418; *Howard et al. v. Norton,* 65 Barb (N. Y.) 161. Accordingly, the only payment made by the Respondent was the value of the assets at the time of the delivery, which was agreed upon as $30,159.58, and was in pursuance of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. It is true that the Receiver held these assets and eventually realized $42,783.35 but that is of no significance. The principal involved in this case is the same as in a situation where a debtor transfers property at an admitted value of $5000 to a creditor to apply on an indebtedness. The title to the property would vest in the creditor immediately and the account of the debtor would be credited with $5000. Under these circumstances, if the property, before it is sold by the creditor, increases in

value, the creditor would, of course, be entitled to the amount of the appreciation, and not the debtor. That is exactly the situation in this case. Of course, as stated by Judge Gibson in his opinion in the District Court, the controlling question is when title to the assets vested in the Petitioner. It is respectfully submitted that not only is this question involved but, more important still, the question is, on what basis the title vested. In other words, what was the consideration of the transfer and what should be the amount of credit to which the Respondent was entitled?

As set forth in the brief supporting the petition in this case, the parties, between themselves, agreed as to the value of the assets turned over to the Receiver. Furthermore, in the Decree of Distribution in the Orphans' Court of Allegheny County, Pennsylvania (see pp. 19 et seq. of said brief), which decree was necessary before Receiver was entitled to these assets, a detailed list thereof was set forth with the respective values of each asset. In other words, this decree described the assets in detail and placed a value upon them and the parties, unless exceptions were filed, which was not done, were bound by these values. Section 2 of the Orphans' Court Act of the Commonwealth of Pennsylvania of June 7, 1917, P. L. 363 (Purdons Pennsylvania Statutes, Title 20 Section 2085) is as follows:

> "The orphans' court of each county, whether separate or otherwise, is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law. Its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal, modification or alteration on appeal."

Here, then, was a Court of competent jurisdiction making a decree in a case in which the Respondent was a party and in which values were given to the assets. The law permitted it ten days within which to file exceptions but it did not do so and, accordingly, the decree became final. Thereupon, by reason of the said quoted Section 2 of the Act of 1917 of the Commonwealth of Pennsylvania, that decree may only be reversed, modified or altered upon appeal to the appropriate appellate court. It may not be attacked in a collateral proceeding such as has been attempted in this case.

It is respectfully submitted that title to the assets vested upon delivery on July 8, 1932 (R. 20a), or on February 13, 1935, the date of the decree of the District Court of the United States for the Western District of Pennsylvania, on the terms agreed upon and also fixed in the said mentioned Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

Respondent claims that it should receive credit for the proceeds realized from the sale of these assets and in support of its position cites the case of *First National Bank of Hoopeston, Illinois,* 23 Fed. Supp. 436 (1938). In that case real estate was turned over to a receiver of a national bank and nothing whatsoever was said about the value of the property at the time of transfer. A portion of the opinion in that case is as follows:

> "The Comptroller authorized the acceptance of this offer and the Court approved the action and authorized the receiver to accept in full of all said liabilities, the said real estate. This property, according to the testimony, originally *cost the* Merritts in

the neighborhood of $20,000.00 *The Receiver sold it September 28, 1937 under authority of the Comptroller of the Currency, duly approved by this Court, for $5,600.00. Nothing else appears in the evidence as to the value of the property."* (Emphasis supplied.)

As stated in the above quotation, nothing whatsoever appears as to the value of the property when it was turned over to the receiver. This is altogether different from the case here under consideration where the parties themselves agreed to the values and, in fact, the assets were decreed to the Petitioner at certain fixed stated prices. In the *Hoopeston* case the only evidence of value was the amount at which it was sold and that amount, therefore, was taken as the value of the property involved. In this case now before this Court, if no value had been placed upon the assets when they were turned over to the Receiver, then it is admitted that the argument of the Petitioner would not be tenable. The authorities sustain the position that where property is transferred in payment of a liquidated debt, and a value is placed upon that property at the time of transfer, payment results only to the extent of such value.

In the liquidation of a national bank a receiver, when he accepts assets other than money in payment of a debt, does not wait until he sells those assets to determine the amount of credit to be given the debtor. The amount eventually received does not determine the amount of credit but rather the value of the asset at the time it is turned over to the receiver. The authority for this practice is set forth on pages 46 and 47 of the brief in support of the petition in this case, whereat

portions of "Instructions to National Bank Receivers" are quoted.

Respondent speaks of the profit made in the disposition of property transferred by a shareholder in satisfaction of his indebtedness as a fund in which the stockholder should participate. Petitioner agrees with this. In fact, Respondent is participating in the profit realized from the sale of the assets which it transferred to the Receiver. The extent of its participation is governed by the amount of its payment into the fund, which was the value of the assets when they were turned over to the Receiver. That payment only represented 85% of the assessment debt and Respondent has been paid on that basis. All other shareholders have been treated in the same way. They have participated in the total fund to the extent of their payment on account of their assessment. The determining factor in this case is the value of the assets when they were turned over to the Receiver and not the proceeds from the sale of those assets. Respondent states that "were it not for the profit from his contributed securities, the fund to be distributed would certainly not have been as great or as large as it is." This is true but it is likewise true in the case of every other shareholder who turned over property, rather than money, which increased in value before it was sold.

During the early 30s, when this transaction took place, many debtors were unable to pay their debts in cash and, instead, transferred to the Receiver property in payment of their obligations. Since most property increased in value over and above its worth when it was received during that period, if the contention of Respondent prevails, it will be necessary to review each and

every one of these transactions in every receivership of a national bank.

Respondent contends that it is not asking that its position be sustained because of the language used in the Orphans' Court proceedings in regard to settlement and satisfaction. On the contrary, it argues "that where assets transferred to a receiver increase in value to more than the original assessment liability, plus interest, the receiver's account and the contributing shareholders have benefited to such an extent that the contributing shareholder is considered to have paid his assessment in full and is entitled to 100% in the distribution of the fund as well as to the return of the profits." As a practical matter, where title to property other than money vested in the Receiver it was considered as a common fund and separate accounts were not kept for each debtor. This has always been the practice of receivers of national banks. When a receiver has property transferred to him he holds it, first, for the benefit of the creditors and then for an agent to be selected by the shareholders. The receiver does not hold that property only for the shareholder who has turned it over to him. In this case the Respondent paid only to the extent of the value of the assets when they were turned over to the Receiver. That value was agreed to by the parties and fixed in the Decree of Distribution in the Orphans' Court of Allegheny County, Pennsylvania, and that decree may not be collaterally attacked as is being done in this case.

In its brief Respondent states that "the important consideration, where there has been a compromise and settlement of a shareholder's liability, is the actual cash received on the sale of the assets and not their market value at the time of the transfer to the Receiver." It is

respectfully submitted that there is no law to support this position and, in fact, Respondent cites no authority for its contention in this respect and, as Judge O'Connell, in his dissenting opinion, says:

> "It is not inapposite to note that, had the Harper Estate and the Receiver not intended such values to be binding upon all interested parties, the trustees of the estate could and should have liquidated the assets so as to have a fund to apply on account of the debt due the Receiver."

In this same connection, Judge Gibson, in his opinion in the District Court, in this case in part said:

> "If the Receiver then had the right to make an agreement by which he released the Harper Estate from liability on an undisputed debt of $34,650.00 upon delivery to him of securities of an admitted net value of but $30,159.58, common sense leads to the proposition that he took title to the securities delivered to him and could handle them as he desired. He took over all the assets of the Harper Estate and that estate lost all title to those assets. If the securities decreased in value he had no remedy, but if the reverse occurred he was the beneficiary, not the Harper Estate. To hold otherwise would be to adopt a 'heads-I-win-tails-you-lose' policy on behalf of the Estate."

It is respectfully submitted that for a receiver to operate under the theory of the Respondent in this case would result in a ridiculous situation. In every case where a receiver took assets other than money in payment of a debt, if the Respondent is correct, as soon as those assets reached a value equal to the debt the receiver or agent would then promptly sell them so that, in

no event, would the debtor or the shareholder ever receive any appreciation in value over and above the amount of the debt. In the instant case, if the theory of the Respondent is correct, surely no one can imagine the Receiver or the Agent retaining the assets after they reached a value equivalent to the debt and interest. As stated, the result of this would be that neither the creditors nor the shareholders would ever be in a position to possibly participate in any appreciation in value in excess of the debt and interest.

Respondent repeatedly speaks of having contributed to the fund the sum of $42,783.35, whereas the fact is he only contributed to the fund the value of the assets at the time they were transferred to the Receiver, which value was $30,159.58. As heretofore stated, when property at a fixed value is turned over in payment of a debt the transaction results in payment of only that amount of money. In this case when the property was receipted for by the Receiver in pursuance of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, and in accordance with the values therein set forth and agreed to by the parties in the Certificate of Settlement or Sale (R. 20a), the status of the Respondent was finally and definitely fixed insofar as its participation in the fund administered by the Agent was concerned. That transaction resulted in a payment of 85% of the assessment and the Respondent has been paid on that basis.

Respondent argued that any other conclusion than his own would result in the Respondent's excess contribution having been distributed to other shareholders and would give them a greater percentage of credit on their original assessment than they had made. It is

respectfully submitted that Respondent has failed to take into consideration that it likewise participates in the appreciation in the value of property transferred to the Receiver by other debtors; not only shareholders but other debtors during the receivership. In other words, if this theory evolved by Respondent applies to shareholders in cases of compromises it would certainly also apply to debtors during all receiverships; for instance, where a debtor was obligated by reason of his liability on a note and was without cash but transferred property to the Receiver on account of his liability. If the Respondent is correct, and the value of the property increased beyond the liability on the note, it would be necessary for the Receiver to refund that excess to the debtor. This was not done and thousands of accounts would come within this category so that it would be necessary to review all of them.

Counsel for Respondent has argued this case upon two theories, first, that the Respondent was entitled to participate in the fund in proportion to which the proceeds from the sale of its assets contributed to that fund and, second, that the Receiver had no authority to sell the securities until he was authorized to do so by the Comptroller of the Currency and upon an order of court.

As heretofore explained, the contribution of the Respondent to the fund was the value of the assets set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, and that agreed to by the parties at the time of their delivery to the Receiver. The question of the participation of the Respondent on this basis is heretofore discussed. As to the second contention of the Respondent, it is respectfully submitted that whether or not the Receiver had any authority to sell the assets was immaterial.

The question is, whether or not title to the assets was vested in the Receiver and on what terms. It is admitted that a Receiver never has any authority to sell any asset without the approval of the Comptroller of the Currency and upon an order of court. However, this has nothing whatsoever to do in determining who is entitled to the proceeds of the sale. That is altogether dependent upon whether or not title vested in the Receiver. If title to the assets vested in the Receiver upon delivery in 1932, the fact that authority to sell them was not obtained until 1935 was immaterial. The right to sell certainly has nothing to do with the fixing of the values.

Respondent insists that counsel for Petitioner always ignores the Respondent's first theory, that Respondent is entitled to participate in the fund in the proportion to which the proceeds from the sale of the assets contributed to that fund. As this theory is understood by Petitioner, that statement is correct. However, it is respectfully submitted that the District Court and the United States Court of Appeals also ignored this theory. It is contended by Respondent that counsel for Petitioner urges that this Court grant a Writ of Certiorari because the lower Court "was in error in stating that the approval of the Comptroller of the Currency and an order of court were necessary for the sale of the securities by the Receiver." Counsel for Petitioner is not aware of ever having presented this argument. It is admitted by Petitioner that it is necessary for the Comptroller of the Currency and a court of record to approve and direct a sale before a sale of any asset of a receivership may be made.

In the brief of Respondent, in regard to interest, there appears the following:

"Since the interest, charged against an assessment liability, is in the nature of a penalty to insure prompt payment, once the liability is paid in full, whether in cash or by the transfer of assets which are liquidated to the amount of that liability, then interest should cease."

From this quotation, it will be noted that Respondent admits that "once the liability is paid in full" then interest should cease but under the theory of Respondent this liability could not have been paid in full until February 13, 1935 because Petitioner had no authority to sell the assets until that time. Therefore, Respondent should be charged with interest on the assessment debt to said date of February 13, 1935. Of course, Petitioner contends that title to the securities vested in the Receiver upon delivery in 1932 when credit was given Respondent for their value of $30,159.58 and thereafter interest accrued only on the balance of the assessment debt.

The Act of February 25, 1930 (Title 12 U. S. C. A. #67)[1] only requires approval of the Comptroller of the Currency and an order of court if there is a compromise. If there was not a compromise but only a payment on account title to the assets vested in the Receiver upon delivery without any further action.

In connection with the delivery of the assets it was stated that this was done "in full settlement" and "in full satisfaction." Also, the petition to the District Court was called a "Petition for Leave to Compromise

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[1] See Note 1, page 5 of Brief in Support of Petition for Writ of Certiorari.

and Settle Assets" and the letter from the Comptroller of the Currency in regard to that petition states that "you are authorized to petition a Court for an order permitting you to accept the securities delivered to your trust in settlement of your Bank's claim in full settlement of the stock assessment liability of the John A. Harper Estate in the amount of $34,650."

Now, just suppose all these phrases were applied to a transaction where A owed B $100 and paid him $50. In other words, when the payment of $50 was made it was stated that it was "in full settlement" and "in full satisfaction" of the debt of $100. Furthermore, let it be assumed that the creditor was a national bank receiver and that he presented a petition "for leave to Compromise and Settle Assets" and that the Comptroller authorized the Receiver to present his petition to court by the use of the pertinent language above quoted. These expressions constitute the only basis for the contention that there was a compromise in this case but, surely, they would not make a transaction a compromise where $50 was paid to a creditor when $100 was admittedly due. Such a transaction is nothing but a payment on account and just because a payment on account is called a compromise does not make it a compromise. Yet that is exactly the situation in this case. Here the debt was $34,650 and securities of "an admitted net value of but $30,159.58," as stated by Judge Gibson, were delivered to the creditor. When a value is agreed upon property turned over in payment of a debt it is the same as the payment of that much money. The case here is exactly the same in principle as where $50 is paid to a creditor to whom there was due the sum of $100. Under no circumstances and by no manner of reasoning or interpretation can this possibly, in law,

be a compromise. It can only be a payment on account. A payment of a definite amount to a creditor who owes a liquidated debt can only amount to that and no more.

And the parties themselves did not consider the transaction a compromise. Proof of this is the fact that the assets actually were turned over to the Receiver by the respondent without obtaining the approval of the Comptroller and an order of court which would have been necessary if there was in fact a compromise. Furthermore, if the parties had understood the transaction as a compromise, they certainly would have proceeded under Section 40 of the Fiduciaries Act of 1917, P. L. 447, of the Comonwealth of Pennsylvania (Purdon's Pennsylvania Statutes, Title 20 Section 787), which provides for the method of procedure to obtain the approval of the Orphans' Court where a fiduciary wishes to compromise a claim. Both sides were represented by very able counsel and it is respectfully submitted that they would have insisted upon such approval and order of court had there been a compromise. Also, receivers of national banks, and especially the one involved in this case, were very familiar with compromises and if a compromise was actually involved the requisite approval and order of court would have been obtained. In addition, promptly after the hearing before the Orphans' Court the Comptroller was informed of all the details of the transaction and even he, at that time, did not instruct the Receiver to secure a court order. Surely, under these circumstances, had there been a compromise, approval of the Comptroller and an order of court would have been obtained.

Clearly, this transaction came within the purview of the "Instructions to Bank Receivers" issued by the

Comptroller of the Currency, which appear on pages 46 and 47 of the Brief in Support of the Petition so that it was not necessary to secure the approval of the Comptroller of the Currency or an order of court. It is true that by letter dated January 7, 1935, the Comptroller authorized the Receiver to petition the court for permission to accept the assets "in full settlement of the stock assessment liability" but this was in response to a letter only asking for authority to sell some of the securities involved. Why the Receiver was so authorized and why the reply of the Comptroller was not limited to a response to the request of the Receiver to sell the securities does not appear and the writer of that letter is not now available but, in any event, it is respectfully submitted that it was a mistake on the part of the Comptroller's Office or, at best, redundant because of the said mentioned instructions issued to Receivers by the Comptroller's Office. The contention that this transaction was only a payment on account is also confirmed by the petition presented by the Receiver to the District Court of the United States for the Western District of Pennsylvania, a portion of which is set forth in R. page 7b and which reads as follows:

> "The Fidelity Trust Company of Pittsburgh, as Trustee, believing that the assessment claim of your Petitioner *should be extinguished in so far as possible,* petitioned the Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932, for an order decreeing the remaining assets of the said Harper Estate to the Receiver of The Bank of Pittsburgh National Association *as payment in so far as possible* of the assessment liability as levied by the Comptroller of the Currency on October 17, 1931." (Emphasis supplied.)

It is respectfully submitted that this language which states that the assessment claim should be "extinguished in so far as possible," and that the assets should be decreed to the Receiver as "payment in so far as possible" precludes any possibility of a payment in full, especially since the decree of the court signed as a result of this petition states that the Receiver should accept the assets in accordance with the Decree of the Orphans' Court of Allegheny County, Pennsylvania, and that decree sets the values in an amount less than the assessment debt, and also since counsel for respondent in the Orphans' Court said that "the assets of the estate are several thousand dollars less than the amount sufficient to pay the Receiver of The Bank of Pittsburgh, N. A." By this language it is admitted that the facts were such that there could not possibly have been a payment in full and that there could only have been a part payment and it matters not that counsel for the Receiver, or even a court, said that the transaction resulted in full satisfaction of the claim.

The single petition to the District Court "for Leave to Compromise and Settle Assets" sought authority to make disposition of four different claims, including that against the Harper Estate. As to one of these claims, not against the Harper Estate, authority was requested "to enter into a compromise settlement" and the effect of the order of court was to approve of this request. In regard to another, again not against the Harper Estate, the petition requested that the Receiver be instructed to "release the residence property of the debtor from under the lien of his judgment" and the order of court gave effect to this request. In the case of another debtor, still not the Harper Estate, the petition and

order of court mentioned a compromise settlement but when it came to the Harper Estate, the case here involved, the petition did not in any way refer to the existence of a compromise agreement but recited that certain named securities valued at $32,759.14 were owned by the Estate and that the "Fidelity Trust Company of Pittsburgh, as Trustee, *believing that the assessment claim of your Petitioner should be extinguished in so far as possible, petitioned the Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932, for an order decreeing the remaining assets of the said Harper Estate to the Receiver of The Bank of Pittsburgh National Association in payment in so far as possible of the assessment liability* as levied by the Comptroller of the Currency on October 17th, 1931. *An order, in accordance with the petition, was duly entered by the Court on May 24, 1932.*" (Emphasis supplied.) Here then we have a petition in regard to four claims. In connection with only two of them, neither of which was the Harper Estate, the term "compromise settlement" is used and, as to another, reference is made to release of property from the lien of a judgment. When we come to the Harper claim in this petition we find that it is set forth that the Respondent here then believed that the assessment claim should be "extinguished in so far as possible" and therefore petitioned the Orphans' Court for an order decreeing the assets to the Receiver "as payment in so far as possible of the assessment liability." It is further stated that an order was made in accordance with that petition. The word "compromise" is not used even once in connection with the Harper claim. Certainly, if there was any intention that the Harper assessment claim was to be compro-

mised, the Receiver would have used the word "compromise" just as he used it in connection with two of the other claims. On the contrary, however, when the case with respect to the Harper claim is presented it is said in effect that the delivery of the assets was to operate as payment of the assessment debt "in so far as possible." Clearly, this definitely means that there was only a part payment involved. And this is supported by the fact that the decree of the District Court directed the Reciever to accept the assets "in accordance with a decree of Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932," and that decree of the Orphans' Court set forth the value of $30,159.58 whereas the debt was $35,654.85.

For the Court to decide that there was a compromise in this case, it is respectfully submitted that it must decide that a payment of $50 in satisfaction of a debt of $100 constitutes, in law, payment in full of the obligation. But this is contrary to all the decisions and principles of the law.

Therefore, since there was no compromise but only a part payment, the transaction between the parties was consummated and title to all the assets vested upon delivery without any necessity to secure the approval of the Comptroller of the Currency or an order of court.

In further support of the contention that title to the assets in this case vested upon delivery, reference is made to the fact that not one transfer agent questioned the transaction when the securities were presented for transfer promptly after their receipt in 1932 in pursuance of the decree of the Orphans' Court of Allegheny

County. If, under the law, title to these securities did not actually vest upon delivery in this case without the approval of the Comptroller of the Currency and an order of court certainly these transfer agents would have refused to transfer the security involved without proof of such approval and order. But there was no approval of the Comptroller of the Currency and order of court when these securities were presented for transfer and without such approval and order the transfer agent must have concluded that there was no compromise since, otherwise, they would have been necessary and the securities would not have been transferred without them. The Respondent, the Fidelity Trust Company, itself, transferred on its own books title to an installment mortgage fund and a mortgage known as the A. Shapiro mortgage without any approval of the Comptroller or order of court.

Petitioner does not argue that it is not possible to compromise the individual liability of a shareholder but does contend that, under the facts of this case, there could not possibly, in law, have been a compromise.

In conclusion, Petitioner respectfully submits:

1. That if there was a compromise in this case then the values of the assets were agreed to by the parties and the decree of the District Court was to the effect that the assets be accepted in accordance with the decree of the Orphans' Court of Allegheny County, Pennsylvania, wherein said values were placed upon each asset.

2. That there was an agreement as to the values of the assets and those assets were delivered to the Receiver in accordance with usual legal process through the

courts and therefore no approval of the Comptroller or order of court was required by reason of the Instructions to Receivers issued by the office of the Comptroller of the Currency.

3. That the transfer of the assets only represented a payment on account and therefore there was no necessity of securing the approval of the Comptroller of the Currency and an order of court. Consequently, title to the assets involved vested in the Receiver upon delivery.

4. That Respondent should be charged with interest upon the unpaid balances of the assessment to the date of the decree of the District Court on February 13, 1935 unless title to the assets should be held to have vested in the Receiver upon the date of delivery in 1932.

5. That if the vital date is taken to be February 13, 1935, as found by the United States Court of Appeals, then, on account of the value of the assets as of that date, the Court was without jurisdiction, because there could not have been a compromise.

Respectfully submitted,

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